

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-1711

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X

REX-NORECO, INC.,

Plaintiff Appellee

- vs. -

ISIDORE GOODSTEIN and PARKSVILLE
MOBILE MODULAR, INC.,

Defendants Appellants

X

74 - 1711

BRIEF OF DEFENDANTS APPELLANTS

and Appendix

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-vs.

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ISSUE PRESENTED

The sole issue presented on this Appeal is whether the District Court abused its equitable discretion in granting a Preliminary Injunction pendente lite which will have the effect of permanently terminating Appellant's only business.

DISTRICT COURT'S FINDINGS,
CONCLUSIONS and ORDER

This cause having come on to be heard on plaintiff's motion for a preliminary injunction pursuant to an Order to Show Cause dated April 19, 1974 and the Court, the Hon. Morris E. Lasker, District Judge, presiding, having considered the Complaint, and having heard and considered plaintiff's said application for a preliminary injunction and all the affidavits and exhibits filed herein to date, and having considered all memoranda of law filed by counsel, and the evidence presented at the hearing held before the Court on April 30, 1974 as well as oral argument of counsel in support of, and in opposition to plaintiff's application for a preliminary injunction and the Court being of the opinion that plaintiff has made the requisite showing for the granting of preliminary injunctive relief, the Court now makes the following:

FINDINGS OF FACT

1. Plaintiff, Rex Noreco, Inc. ("Rex") is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Englewood, New Jersey. It is qualified to do business and maintains a sales location for the sale of mobile homes at Loch Sheldrake, Sullivan County, New York.

2. Defendant, Isidore Goodstein ("Goodstein") is an individual residing at and engaged in business in and about Parksville, Sullivan County, New York.

3. Defendant, Parksville Mobile Modular, Inc. ("Parksville) is a corporation organized and existing under the laws of the State of New York with its principal place of business in or about Parksville, Sullivan County, New York. None of the jurisdictional allegations as to the respective parties hereto as set forth hereinbefore are or have been controverted by the parties.

4. Goodstein began his employment with Rex in November, 1965 as a sales lot manager. Goodstein remained continuously in Rex's employ until on or about February 5, 1974, when Goodstein sent in notice of termination of his employment to Rex. At the time that Goodstein resigned from Rex's employ and for some time prior thereto, he was a Vice President of Rex and was paid a salary of approximately \$30,000.00 per year plus substantial fringe benefits consisting of stock options and the like.

5. During the years that Goodstein was employed by Rex in the course of, and as part of his duties with Rex, Goodstein received training in and exposure to those factors material and relevant to successful selection and operation of mobile home retail sales lots. The operation of the mobile home retail sales lots industry is a specialized and unique business which has characteristics differentiating it from other retail operations. Particularly after his promotion to an executive position with Rex, Goodstein also received

6. Included in the exposure to Rex's confidential information, trade secrets and know-how which Goodstein received were specialized sources of new and used mobile homes; methods for merchandising new and used mobile homes with maximum effectiveness; information relating to the selection of sites for mobile home retail sales outlets particularly in the Sullivan County, New York area; the operating results of various retail sales outlets operated by Rex; and methods and sources for financing new and used mobile home inventories. Goodstein reached the point with Rex where it was his responsibility to select sites for Rex operated retail outlets in areas as diverse as Williamsport, Pennsylvania; Ellenville and Loch Sheldrake, New York; Wilson, North Carolina and Jacksonville, Florida.

7. On or about August 14, 1970 by reason of the ever increasing amount of confidential information, trade secrets and know-how to which Goodstein was becoming privy by reason of his employment, and as an inducement to Rex to continue him in such employment, Goodstein signed an agreement with Rex. Exhibits A and B annexed to the complaint constitute a true and correct copy of said agreement. Said agreement has been continuously in force and effect since that time except that Goodstein terminated his employment thereunder on or about February 5, 1974. Rex has performed all of its obligations under said agreement.

8. Said agreement provided in pertinent part that during the period of Goodstein's employment by Rex, Goodstein would devote his "entire time" to his employment by Rex and could not have "a financial or beneficial interest in any business or enterprise engaged in the same or similar business" to that of Rex. Said agreement further contained the restrictions hereinafter set forth letter of interpretation of even date therewith also annexed on Goodstein's activities for a two year period following termination of Goodstein's employment with Rex within a two hundred mile radius of Rex's retail sales locations existing on August 14, 1970 or on the date of such termination of employment.

"3. the EMPLOYEE agrees that on the termination of its employment, for any reason whatsoever, he will not for (2) two year(s) thereafter engage, either directly or indirectly, in any business or employment similar to or competitive with the business of the EMPLOYER, nor will he within said period of time divert or attempt to divert from the EMPLOYER, or any business or concern represented by it, any business whatsoever, particularly by influencing or attempting to influence any of the customers or business contacts of the EMPLOYER. The EMPLOYER agrees to the foregoing covenants and restraints as to his activities upon the termination of his employment, recognizing the irreparable damage which will or may result to the EMPLOYER in the event of a breach of these covenants and restraints. The EMPLOYEE further agrees that in the event of such breach, the EMPLOYER shall be entitled, in addition to any other remedies and damages available to it by law, to a preliminary restraint and temporary and permanent injunctions to restrain the violation by the EMPLOYEE of such covenants and restraints."

9. During the last several months while employed by Rex, and after he terminated his employment with Rex on or about February 5, 1974, Goodstein knowingly violated and continues to violate the terms and provisions of said agreement. On November 26, 1973 while still employed by Rex, Goodstein caused defendant Parksville to be incorporated under the laws of the State of New York, with Goodstein being the principal officer and shareholder thereof, for the purpose of engaging in the mobile home business in competition with Rex. Such facts were not known to Rex at the time that Goodstein terminated his employment with Rex.

10. Goodstein, through Parksville, is presently making and has made arrangements to own and operate, and in fact is admittedly owning and operating, a mobile home retail sales location in Parksville, Sullivan County, New York, within seven miles of the Loch Sheldrake, New York location of a Rex mobile home retail sales location. Said Rex retail sales mobile home location was in existence and operation at Loch Sheldrake on August 14, 1970 and has been in existence and operation continuously thereafter. In this region and in this type of business the two mobile home retail sales locations will clearly be in direct competition. The extent of conflict and abuse of confidential information in the selection of this location by Goodstein for his and Parksville's mobile home retail sales location is indicated by the fact

that it was Goostein who, while in the employ of Rex, selected the Loch Sheldrake site for the Rex sales location. Furthermore, as an officer of Rex, Goodstein had access to and availed himself of operating results of Rex's Loch Sheldrake outlet.

11. Goodstein has refused to cease and desist from his competitive activities despite Rex's demands that such be done.

12. If defendant's conduct is permitted to continue Rex will suffer irreparable injury in terms of loss of retail business, interference with proper performance of service obligations to lending institution clients, and harm to good will developed over the years. Rex does not have an adequate remedy at law to compensate it as to such injury.

CONCLUSIONS OF LAW

I. This Court has jurisdiction over the parties hereto and over the subject matter of this litigation.

II. The conduct of defendants and each of them in engaging in the business of selling mobile homes at their mobile home retail sales location located in or about Parksville within seven miles of Loch Sheldrake, is a violation of the August 14, 1970 agreements between Rex and Goodstein.

III. This Court therefore has the power in its discretion to enjoin the acts on the part of defendants, and each of them, to maintain the status quo until a final determination.

IV. On all the facts and the showing made by the parties and their declared intentions, this Court is warranted in exercising its discretion to grant a preliminary injunction to endure until final determination has been made as to Rex's right to a permanent injunction, or until August 24, 1975, whichever occurs first.

NOW THEREFORE, this Court being duly advised in the premises and believing in its discretion that relief should be granted to the plaintiff:

IT IS HEREBY, ORDERED AND DECREED:

That the defendants, ISIDORE GOODSTEIN and PARKSVILLE MOBILE MODULAR, INC., individually and collectively, are hereby enjoined and restrained until final determination of this action from directly or indirectly in any way:

(a) engaging in the sale of mobile homes, directly or indirectly, from defendants' present sales location located in or about Parksville, Sullivan County, New York, or from any other location within a 200 mile radius of Loch Sheldrake, except that the terms of this Order for Preliminary Injunction shall not be effective as respects performance of any contracts for the sale of mobile homes made by the defendants prior to the making of this Order or to delivery of any mobile home pursuant thereto;

(b) performing or committing advertising, servicing, or financing of the sale of mobile homes at Loch Sheldrake, or insuring mobile homes or the lives of mobile home purchasers as an incident to the

sale of mobile homes in Loch Sheldrake, Sullivan County, New York:

and it is further

ORDERED AND DECREED that the terms of this Order for Preliminary Injunction are stayed for a period ten (10) days, after filing and entry of same in the office of the Clerk of this Court, to afford the Plaintiff an opportunity to appeal this Order and to apply for a further stay in connection with said appeal.

The plaintiff shall file security in a form satisfactory to the Clerk of this Court in the amount of Fifteen Thousand Dollars (\$15,000.00).

s / Morris E. Lasker

Morris E. Lasker
United States District Judge

Dated: New York, New York
May 20, 1974

STATEMENT OF THE CASE

This is an action by Rex-Noreco, Inc., to permanently enjoin Isidore Goodstein and the Corporate Defendant from engaging in the business of selling mobile homes and trailers at Parksville, Sullivan County, New York.

Rex-Noreco, Inc. (Rex) is a publicly held corporation and is in the business among others, of selling at retail, mobile homes. Isidore Goodstein (Goodstein) is a former employee of Rex. Rex is principally in the business of financing mobile home sales operations, insuring the lives of creditors and the interests of others with regard to mobile home sales, and providing a repossession service for institutional lenders relative to mobile home financing. On August 14, 1970, while Goodstein was still in the employ of Rex, he entered into an employment agreement containing a restriction against competition. This agreement was simultaneously modified by letter agreement which recognized Goodstein's right to open a mobile home sales business, providing the same is located more than a 200 mile radius from any existing sales location of Rex or ones that they may open in the future. These agreements are annexed to the complaint herein.

In February, 1974, Goodstein left Rex's employ and opened his own mobile home sales business in Parksville. He operated the same under the close corporate entity of Parksville Mobile Modular, Inc. (Parksville, Inc.)

the co-defendant herein. In April of this year, Rex commenced the instant action seeking to restrain Goodstein and Parksville, Inc., from conducting their business. Simultaneously therewith, Rex sought a preliminary injunction pende lite. The basis of Rex's claim is that it operates a mobile homes sales outlet at Loch Sheldrake, Sullivan County, New York, under the corporate entity of Loch Sheldrake Mobile Homes Sales, Inc. (Loch Sheldrake) which is concededly about seven miles from Parksville. Rex contends that the Loch Sheldrake site is controlling and determines the 200 mile radius of prohibited competition. Rex also seeks an accounting for all trailers sold by Goodstein allegedly in violation of the employment agreements.

Throughout the action Goodstein maintains that Rex sold the Loch Sheldrake sales lot in March of 1973 to Morris Mersky who operates the same under the name of Ramad Sales Corp. (Ramad), and that any business it may be conducting at the Loch Sheldrake site by Rex is now solely confined to its repossession service whereby it stores repossessed mobile homes acquired throughout the northeast and whereby Ramad, as the lot owner, through its employees and salesmen offers them for sale to the public. The Appellants are not now nor never have been engaged in such a repossession service. In turn, Rex contends that the sale to Mersky was of the lot only; that it retained approximately 50 mobile homes on the lot at the time of sale, and that it, not Ramad, conducts sales at retail at the Loch Sheldrake site.

After the submission of voluminous affidavits, an evidency hearing prior to granting the preliminary injunction was held by District Court (S. D. N.Y.) Judge Morris E. Lasker who took testimony from Rex's President, Mark A. Salitan, but declined to take testimony from Defendant Goodstein, even though he was present and Counsel offered to introduce his ¹ testimony.

This hearing lasted less than one-half hour. Judge Lasker thereafter made his findings of fact and conclusions of law and found Rex to be conducting a sales location for the sale of mobile homes at Loch Sheldrake, and that if Goodstein were not enjoined that Rex would suffer irreparable harm. He made no findings as to the extent of injury that might be sustained by Goodstein upon issuance of the preliminary injunction or whether or not Rex would in all likelihood be ultimately successful on the question. Rather, he concluded summarily, as a matter of law, that Goodstein's business was a violation of the August 14, 1970, agreements and enjoined him and Parksville pende lite from engaging in such business.

The Order was signed on May 20, 1974, but was stayed for ten days to allow Goodstein to seek a stay from this Court pending appeal thereof.

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1. This testimony was transcribed and is included in the appendix hereto.

At the time of docketing the record herein, the Southern District Court Reporters' office maintained that the same was not transcribed. (See USCA 2nd Cir. form D dated 6/15/74 executed by Mrs. M. Perlstein). Therefore, the transcript is not part of the record.

A motion for a stay was heard by this Court on May 28, 1974, and denied.

In lieu thereof, this Court granted permission for an expedited appeal to be heard on June 28, 1974, and waived the requirement of printed briefs and appendices.

Appellants contend that in view of the conflicting facts, the questionable nature of the Rex "business" at Loch Sheldrake and the severe detrimental effect upon them - which will put Goodstein permanently out of business - the District Court abused its discretion in granting the preliminary injunction, and the same should be vacated.

POINT I

THE APPELLEE IS NOT ENTITLED TO A PRELIMINARY INJUNCTION AS OF RIGHT

It is a generally recognized principle that granting or denying a preliminary injunction is a matter directed at the discretion of the Court, and no litigant, notwithstanding a showing of irreparable injury, has a right to such relief. See Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944) at 321 U.S. 440:

"The award of an interlocutory injunction by Courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may result to the plaintiff. ***Even in suits in which only private interests are involved, the award is a matter of sound judicial discretion, in the exercise of which the Court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." (Emphasis supplied.)

While irreparable injury is a prerequisite for the granting of a preliminary injunction, it is not controlling. Norwalk Core v. Norwalk Board of Education, 298 F. Supp. 203 (D.C. Conn., 1968).

Assuming arguendo that Rex has demonstrated irreparable injury and a violation of the August 14, 1970, agreements, it is not entitled - without more - to the relief awarded by Judge Lasker, and in any case, it is not entitled to preliminary relief as of right.

POINT II

IN GRANTING A PRELIMINARY INJUNCTION PENEDE LITE, THE COURT MUST CONSIDER FOUR FACTORS, TO WIT: LIKELIHOOD OF SUCCESS; PLAINTIFF'S IRREPARABLE INJURY; HARM TO OTHER PARTIES; AND THE EFFECT ON THE PUBLIC INTEREST.

As was stated in Yakus v. United States, supra, in the exercise of its judicial discretion, the Court "balances the conveniences of the parties and the possible injuries to them" when granting a preliminary injunction. That test of balances has been reduced to a four-fold set of criteria that must be dealt with by the Court prior to granting preliminary relief. They are recited in First Citizens Bank & Trust Company v. Camp, 432 F. 2d 481 (USCA 4th Cir., 1970). They are:

1. Has the (plaintiff) made a strong showing that it is likely to prevail on the merits***?
2. Has the (plaintiff) shown that without such relief, it will be irreparable injured?

3. Would the issuance of the (injunction) substantially harm other parties interested in the proceeding?
4. Where lies the public interest?

Judge Waterman writing for this Court sitting en banc in Chappell & Co. v. Frankel, 367 F. 2d 197 (U.S.C.A. 2d Cir., 1966) has phrased the test thusly:

"A motion for a preliminary injunction invariably raises an issue as to '***how best to create or preserve a state of affairs such that (the court) will be able, upon conclusion of the full trial, to render a meaningful decision for either party'. Developments in the law - Injunctions, 78 Har. L. Rev. 994, 1056 (1965). Its grant or denial depends on the trial court's equitable balancing of several factors: the severity of the plaintiff's injury if preliminary relief is denied, the severity of the defendant's injury if preliminary relief is granted, and the likelihood that one party or the other will prevail at trial."

See also Hamilton Watch Co. v. Benrus Watch Co., 206 F 2d 738, 743 (USCA 2nd Cir., 1953) and RFD Group Limited v. Rubber Fabricators, Inc., 323 F. Supp. 521, 527, (SDNY, 1971).

POINT III

THE DISTRICT COURT MADE NO FINDING AS TO THE INJURY TO THE DEFENDANT UPON GRANTING THE PRELIMINARY RELIEF. SUCH RELIEF WILL TERMINATE DEFENDANT'S BUSINESS AND IS INJURIOUS TO THE MOST EXTREME DEGREE. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT TAKING THIS INTO CONSIDERATION.

As pointed out in Point II hereof, one of the four critical areas that the Court must consider in granting preliminary relief is the resulting injury to the Defendant if the preliminary injunction is granted as weighed against the injury to the Plaintiff if preliminary relief is not granted. As was stated in Selchow & Righter Co. v. Western Printing & L Co., 112 F. 2d 430 (CCA 7th, 1940):

"The action of the District Court on a motion for preliminary injunction is not predicated upon an anticipated determination of issues of fact or questions of law which may be involved in the case. Consequently, where the granting of a preliminary injunction would give to the Plaintiff all the actual advantage which could be obtained by the Plaintiff as a result of a final adjudication of the controversy in favor of the Plaintiff, a motion for preliminary injunction should be denied. On the other hand, when the denial of the motion will result in great injury to the Plaintiff and in the Defendant's getting substantial advantage to which he would be entitled only as the result of a final adjudication in his favor, the preliminary injunction should be granted if the defendants' interest can be protected by indemnifying bond."

Although the District Court was required to make a finding in this regard [First-Citizens Bank & Trust Co. v. Camp., 432 F. 2d 481, (USCA 4th Cir., 1970)], it did not do so. Judge Lasker's findings and conclusions are completely devoid of any such balancing of interests.

If the District Court had delved into the question, it would have found that by granting the preliminary injunction, it would - and will - put the Defendants permanently out of business. In effect, by granting the preliminary injunction, the Court has given plenary relief to the Plaintiff

Goodstein had just started his business when this action was commenced. He had made approximately seven sales by the time the preliminary injunction was issued. The good will it had built up was infinitesimal. Goodstein and Parksville, Inc., are one and the same. Goodstein along with his wife is the principal stockholder and officer in Parksville, Inc. It is Goodstein's only business. His family participates in this business, his wife in the office and some of the children on the lot. It is his only way of making a living for himself, his wife, and five children. If sustained, the preliminary injunction will have struck a fatal blow to the infant business, forcing Goodstein and his family to lose its only means of livelihood in obvious difficult economic times.

On the other hand, Rex, a public corporation, is an industry leader in mobile home retail services. In 1973 it had assets of over \$34 million and revenues of over \$10 million. It derived \$4.8 million from premiums in its insurance business, \$1.9 million in its role as an institutional lender, and over \$1 million from its "service" operations, including its repossession service. However, in 1973, it lost \$53 million on its mobile home sales operation. These figures are derived from Rex's 1973 annual report on file with the Securities Exchange Commission. Clearly, Rex's major operation is in the insurance and financing field. Its role as a retail sales operator is minuscule compared to its other areas of endeavor.

Additionally the appellee seeks an accounting for all sales made during the alleged violation of the employment agreements. If its position is sustained after trial, it will be entitled to recover its losses - if any - in such a manner. In view of this can it be said that if preliminary relief pendente lite were not granted, the result to Rex would be "a great injury" or "a grave, certain and irreparable injury". [cf. Ohio Oil Co. v. Conway, 279, U.S. 813 (1929)] Can it be fairly said that the few sales Goodstein might make by the time of final determination on the merits will cause irreparable harm to the income of this industry giant which derives the bulk of its income in areas other than retain mobile home sales? It is wrong to think so! It is indeed ironic that this same District Court Judge did not utilize such a balancing of interests as he did in R.F.D. Group Limited v. Rubber Fabricators, Inc., 323 F. Supp. 521 (SDNY, 1971) wherein Judge Lasker stated at 323 F. Supp. 528:

"While failure to grant an injunction may cause damage to the Plaintiff's pendante lite, its issuance would put the defendant out of ***business altogether. Aside from the fact that, under the circumstances, the balance of hardships tips decidedly towards defendants, the issuance of such an injunction would for all practical purposes grant plenary rather than preliminary relief."

So too, the preliminary injunction issued herein will - if sustained - grant Rex plenary relief and there will be little, if anything to salvage by the time of trial.

Rex will have fully accomplished its purpose, i. e., to put Goodstein and his family permanently out of business long before a trial on the merits of its vigorously disputed claim. The reasoning of Judge Weinfeld in Anderson-Friberg, Inc. v. Justin R. Clary & Son, 98 F. Supp. 75, 72 (SDNY, 1951) is applicable.

"The law is well settled that the extraordinary relief of a preliminary injunction, which in advance of trial in effect gives a party full relief to which he might be entitled after a full trial, will not issue under such circumstances."

See also United States v. Adler's Creamery, 107 F. 2d 987, 990 (CCA, 2d 1939) and Sims v. Stuart, 291 F. 707 (CCA 2d 1922).

It is submitted that Judge Lasker abused his discretion in this regard. He failed to ascertain any facts relating to the harm caused Goodstein by the preliminary injunction. He failed to balance that harm against the harm to the Plaintiff if the injunction were denied. He, in effect, granted Rex final relief under the guise of a preliminary injunction.

POINT IV

THE DISTRICT COURT MADE NO FINDING AS TO WHETHER THE PLAINTIFF WOULD ULTIMATELY PREVAIL BUT IN AN ABUSE OF DISCRETION CONCLUDED SUMMARILY THAT APPELLANT VIOLATED THE RESTRICTIVE COVENANT.

One - and only one - of the several factors to be considered by the Court is the Plaintiffs likelihood of success on a trial of the merits. It is merely

one strong factor to be weighed along with the comparative injuries to the parties. Gulf & Western Indus., Inc. v. Great A&P Tea Co., Inc., 356 F. Supp. 1066 (SDNY, 1973). Notwithstanding this rule, Judge Lasker went beyond his equitable powers on the application before him and determined summarily that Goodstein is violating the August 14, 1970 agreements. He made no finding that Rex would in all likelihood succeed on the trial of that issue, but instead decided the issue ipso facto. He did this in the face of sharply disputed issues as to the extent of Rex's business at Loch Sheldrake and without ever having heard testimony from the defendant Goodstein. The question of just what business Rex conducts at the Loch Sheldrake site, if any, is hotly disputed. Beyond that, the question of whether any such business is in violation of the meaning, intent and scope of the August 14, 1970 agreements is in sharp dispute. The mere fact that Goodstein may have formed Parksville, Inc. while still in Rex's employ is not conclusive and the District Courts reliance on this fact is misplaced. cf Town & Country House & Home Service, Inc. v. Newberry, 3 N.Y. 2d 554, 561. Where sharp issues of fact are presented, it is apparent that the case is not a fit one for preliminary relief and the resolution of the disputed issues must await trial. Heyman v. Ar. Winarick, Inc., 166 F. Supp.

880 (SDNY, 1958); Eastin-Phelan Corp. v. Hal Roach Studios, Inc., 350 F.
Supp. 1328 (SDNY, 1972).²

It is submitted that in view of the proceedings heretofore had, Judge Lasker was wholly outside his province in summarily deciding that Goodstein violated the restrictive agreement. To wit, Judge Lasker did not allow Goodstein to testify; he took no evidence as to the lapse of the Loch Sheldrake dealer plates required by Article 16 of the New York State Vehicle & Traffic Law; he took no evidence relating to relationship of Ramad (and its employees and salesmen) and Loch Sheldrake with regard to Loch Sheldrake's repossession business and who actually sells the repossessed trailers to the public or why Rex reported to its stockholders the proceeds of the Rex-Mersky sale as an extraordinary credit from the sale of mobile home park and "sales" center, or most importantly relating to the Rex repossession business vis a vis the Goodstein direct retail business whether the same was competitive as meant by the 1970 agreements.

Judge Lasker did nothing more than to read the affidavits submitted, take prefunctory testimony from one side - the Plaintiff, refused to take testimony

2. It is only when the scales of hardship are decidedly tipped in favor of the Plaintiff-a matter vigorously disputed herein. - See Point III- that the Plaintiff need only show questions of such a serious nature as to make them fair ground for further deliberation. Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (USCA 2d Cir., 1953).

from the Defendant and thereupon concluded summarily that the Defendant is in violation of the agreements. Such a one sided presentation is unrealistic, unfair, and violative of the spirit of Federal Rule 65 (A) (1) - cf. Sims v. Greene, 161 F. 2d 87 CCA 3d, 1947). While a "trial type" hearing may not always be necessary in this circuit, Plaintiff's affidavits and one-sided oral testimony should not be considered conclusive where there is a factual dispute as there is here. cf. SEC v. Frank, 338 F. 2d 486 (USCA, 2nd Cir., 1968) & Canter-Wallace, Inc. v. Davis-Edwards Pharmacal, Inc., 443 F. 2d 867, 872 ft. nt. 5, (USCA 2d Cir., 1971).

Simply stated, Judge Lasker determined preliminarily and summarily the fact of Goodstein's violation without testimony from him or other witnesses of the Defendants and on affidavits that clearly show a serious question of fact as to whether Rex is (1) conducting a retail sales lot at Loch Sheldrake and (2) whether the nature of such conduct -if any - is competitive vis a vis Goodstein. This alone is an abuse of discretion.

CONCLUSION

District Court Judge Lasker summarily and arbitrarily determined the appellants to be in violation of a restriction against competition. He did so without benefit of testimony from the appellants. He arbitrarily issued a preliminary injunction without measuring the severe effect thereof upon the

appellants as compared to the injury to the appellees if the injunction did not issue. He has permitted the appellees to achieve full and final relief in advance of a trial on the results. The District Court abused its equitable discretion in granting the subject preliminary injunction and the same should be vacated.

FABRICANT, LIPMAN, KENNEDY & SWEENEY
Attorneys for Appellants

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
REX-NORECO, INC.,

Plaintiff Appellee

- vs. -

ISIDORE GOODSTEIN and PARKSVILLE
MOBILE MODULAR, INC.,

Defendants Appellants

-----X

APPENDIX

1

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 REX-NORLCO, INC., :
6 Plaintiff :

7 vs. : 74 Civ. 1728

8 ISADORE GOODSTEIN and :
9 PARKSVILLE MOBILE
MODULAR, INC., :
10 Defendants, :
11 -----x

12 BEFORE:

13 HON. MORRIS D. LASKER,

14 District Judge

15 New York, N. Y.
May 6, 1974

16 APPEARANCES:

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19 FABRICANT LIPPMAN KENNEDY & SWEENEY, ESQS.
20 Attorneys for Defendants
BY: HERBERT J. FABRICANT, ESQ.

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2 (In chambers)

3 THE COURT: This is an application for a prelimi-
4 nary injunction alleging a violation of a covenant not to
5 compete. As I read the papers which have been submitted
6 so far, that is, affidavits in support of the motion and
7 in opposition to it. The factual issue is raised by the
8 defendant as to whether or not the operation being con-
9 ducted at the location which, for the purpose of this
10 hearing and motion we will call the Loch Sheldrake location,
11 is of such a nature as to qualify as a location referred
12 to in the letter covenant not to compete, which letter
13 was supplemented by a letter of the same date, I believe,
14 August 14, whatever year it was, and it is for that reason
15 that I have asked Mr. Roth to have available to testify
16 on that question, somebody associated with Loch Sheldrake
17 or with Rex-Noreco who can answer any questions that I
18 may have or that Mr. Fabricant may wish to put before the
19 Court.

20 Mr. Roth?

21 MR. ROTH: I have Mr. Mark Salitan here, your
22 Honor, and Mr. Salitan is president of Rex-Noreco. He has
23 been with Rex-Noreco since its inception and I am prepared
24 to proceed in the interest of expedition any way your
25 Honor wishes in terms of trying to prove a prima facie

2 case or --

3 THE COURT: I think it would be helpful if you
4 question him, now that you have seen Mr. Fabricant's papers
5 which you hadn't seen at the time you submitted the last
6 ones, to cover any points you think may not have been
7 covered in those papers or give a general description of
8 the operations there and precisely what it is that either
9 Rex-Noreco or Loch Sheldrake does and then Mr. Fabricant
10 can cross-examine in any way he wishes to do so.

11 M A R K A. S A L I T A N , the witness, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. ROTH:

15 Q Mr. Salitan, in August 1970, was there a sales
16 location at Loch Sheldrake operated by Rex-Noreco?

17 A Yes, sir.

18 Q Was that the Loch Sheldrake location?

19 A Yes, sir.

20 Q Has that sales location been in continuous opera-
21 tion since then?

22 A Yes, it has.

23 THE COURT: May I intervene to ask if you will
24 tell me just what you did at Loch Sheldrake in those days.

25 That means either Rex-Noreco or its affiliates and who

2 did it.

3 Q . Would you be responsive to the Judge's question,
4 please.

5 A From the beginning at Loch Sheldrake and up to
6 the present time we sell mobile homes to retail customers.

7 Q Is that all that you -- when I say you I mean
8 Rex-Noreco does at that location?

9 A That is not all Rex-Noreco does but that is all
10 the subsidiary Loch Sheldrake does at that location.

11 Q Does Loch Sheldrake advertise in the local papers?

12 A Yes, it does.

13 Q Does it advertise in the -- well, do these
14 advertisements annexed to your affidavit sworn to April 25,
15 are those representative advertisements placed by Loch
16 Sheldrake in the papers in that vicinity?

17 A Yes, they are.

18 MR. ROTH: I ask your Honor to note that those
19 advertisements go through 1974.

20 THE COURT: I did notice that. Indeed I don't
21 take Mr. Fabricant to question the authenticity of those
22 ads, is that correct?

23 MR. FABRICANT: I don't question the fact they
24 are ads placed in the local papers that say Loch Sheldrake.

25 Q And does Loch Sheldrake also pay sales tax to New

1 York State on sales made from that location?

2 A Yes, they do.

3 Q And are those sales locations, sales tax returns
4 set forth to the affidavit of Reuben Shertz previously
5 submitted in this action?

6 A Yes, they are.

7 MR. ROTH: I ask your Honor to take notice that
8 those sales tax returns go through the first quarter of
9 this year.

10 THE COURT: Yes.

11 Q Does Rex-Moreco continue its operations at pre-
12 sent as is indicated in terms of those advertisements and
13 in terms of those sales tax returns?

14 A Yes, it does.

15 Q Now, how many trailers are there presently at
16 the Loch Sheldrake location which Loch Sheldrake has up
17 for sale?

18 THE COURT: Trailers is the equivalent of mobile homes

19 MR. ROTH: Yes.

20 A Approximately 30.

21 Q And are those trailer there pursuant to lease
22 with anyone?

23 A Yes, they are.

24 Q Is that the lease referred to in Mr. Feldman's
25

2 affidavit?

3 A Yes.

4 THE COURT: That is a real estate lease you are
5 referring to, is that right, the lease of the land on which
6 these mobile homes are located?

7 A Yes.

8 Q Does Loch Sheldrake pay compensation with respect
9 to sales for mobile homes made from that location?

10 A Yes, it does.

11 Q Do you on occasions send an inspector out to
12 supervise the premises from the home office?13 A Yes, we make audits from the home office of all
14 our sales locations.15 Q During 1970, did Loch Sheldrake sell both new
16 and used mobile homes from that location?

17 A Yes, they did.

18 Q At present, is there any difference in the opera-
19 tion in terms of type mobile homes sold by Loch Sheldrake?20 A Yes, Loch Sheldrake only specializes in selling
21 used mobile homes at the present time.22 Q Approximately how far is the defendant Goodstein's
23 location from your location?24 MR. FABRICANT: Conceded to be seven miles or
25 thereabouts. . .

2 MR. ROTH: No further questions, your Honor.

3 THE COURT: Mr. Fabricant.

4 CROSS-EXAMINATION

5 BY MR. FABRICANT:

6 Q Mr. Salitan, you referred to the dealer in the
7 location at Loch Sheldrake as Loch Sheldrake or Rex-Noreco?

8 A Loch Sheldrake.

9 Q What is the name of that dealer?

10 A Loch Sheldrake Mobile Homes Sales, Inc.

11 THE COURT: A separate corporation, is it?

12 THE WITNESS: A wholly owned subsidiary of Rex-
13 Noreco, Inc.

14 Q Did it ever own the location in Loch Sheldrake?

15 A It did.

16 Q Does it own it now?

17 A No.

18 Q Do you have a copy of the lease with you?

19 THE COURT: Isn't the lease among the papers --

20 MR. ROTH: I believe they are annexed to Mr.

21 Feldman's affidavit. Mr. Feldman is here.

22 Q When was the property in Loch Sheldrake sold?

23 A I believe it was sold, approximately, don't hold
24 me exactly to the date, around March, the end of March of
25 '73. March 31st or April 1st, it may have been May 1st,
47-2

2 I am not positive, '73.

3 Q And at that point was anything else sold besides
4 the land?

5 A Yes, we sold the new inventory that we had at
6 the time, that is, the new mobile home inventory and we
7 sold the trucks and the other fixtures. You know, the
8 furniture and fixtures, that type of thing.

9 THE COURT: In effect did you sell anything about
10 the used inventory?

11 THE WITNESS: Yes, we didn't sell the used.

12 THE COURT: Is it correct to say that in effect
13 you did sell everything else?

14 THE WITNESS: Yes. We sold everything but the
15 used mobile homes. And we didn't sell -- can I continue?

16 THE COURT: Yes.

17 THE WITNESS: And we didn't sell the name. We
18 didn't sell the goodwill. We didn't sell the right to do
19 business there obviously.

20 THE COURT: I am speaking of tangible assets.

21 THE WITNESS: Absolutely, your Honor.

22 Q To whom did you sell it?

23 A We sold the land to an individual by the name of
24 Morris Mirsky.

25 Q Who is he?

2 MR. ROTH: Your Honor, I object to that.

3 THE COURT: Sustained. I don't see the relevance
4 to that. You are prepared to admit he has no connection
5 with your organization, is that right?

6 THE WITNESS: He has no connection.

7 Q He has no connection, is that what you are saying?

8 A That's right.

9 Q While I am looking for this affidavit, Mr.
10 Salitan, did you report the sale of the mobile home sales
11 agency and location in your year-end report and in your
12 quarter-end report?

13 MR. ROTH: Objection.

14 THE COURT: Let's take that separately. Will
15 you answer that separately as to whether you reported the
16 sale of the location?

17 A We reported the sale of the land --

18 THE COURT: Real estate?

19 A Real estate and the equipment that went with the
20 real estate at that time.

21 THE COURT: Did you report the sale of the agency?
22 Or did you sell the agency?

23 THE WITNESS: We did not report -- if I recall
24 correctly, we reported the sale of the land and the equip-
25 ment that was on the land to the appropriate authorities.

2 The SEC and so forth.

3 THE COURT: Let me say, Mr. Fabricant, it seems
4 to me there is no substantial dispute even on your part
5 unless I am wrong as to what the facts of the sale were
6 that have been pretty well documented by the documents of
7 sale and the documents that you put in evidence in your
8 answering affidavits and I accept the fact, without any
9 question, which doesn't seem to be disputed by the plain-
10 tiff, that the location was sold and the physical assets
11 indicated were sold.

12 Q Well, when you sold whatever it was that you
13 sold at the Loch Sheldrake location, did you not agree to
14 arrange financing for the sale of mobile homes by the
15 purchaser?

16 MR. ROTH: Objection as to --

17 THE COURT: Sustained.

18 Q Did you make any arrangement for financing the
19 sale of mobile homes at the Loch Sheldrake location?

20 MR. ROTH: Objection.

21 THE COURT: Sustained.

22 Q After you sold the property?

23 THE COURT: I will sustain the objection. If
24 you wish to ask some questions with regard to other aspects
25 of the business of the plaintiff carried on at this location
4:30

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2 I am agreeable to your asking those questions. What else
3 do you do there besides sell used homes, if anything?

4 Q You may answer the question that the Judge put
5 for me.

6 A We sell the used mobile homes and we service them
7 when there are problems connected with them.

8 THE COURT: Let's get into that for a minute.

9 Who does the servicing? Does Loch Sheldrake do the ser-
10 vicing?

11 THE WITNESS: Yes.

12 BY THE COURT:

13 Q What does the servicing consist of?

14 A For example, if a heater or something doesn't
15 work in the mobile home --

16 Q Are you talking about the mobile homes that you
17 sell yourself?

18 A Yes.

19 Q I take it that there are other operations con-
20 ducted on the piece of land that you sold by Mr. Mirsky
21 or whoever now conducts that operation. Does Loch Sheldrake
22 perform any services for anybody but itself and for its own
23 customers?

24 A Yes.

25 Q Would you describe those services, please?

2 A We have a continuing obligation, service obliga-
3 tion with a number of banks that we represent in our main
4 operation in Rex-Noreco's operation and one of the primary
5 obligations in those service obligations is that we pick
6 up any repossessions that they have, these banks that
7 we represent, and that we refurbish them, clean them and
8 resell them for the account of those particular banks
9 that we represent.

10 Q When did you first begin to perform this service?

11 A The last one that I just described?

12 Q Yes.

13 A We have been doing that since 1960.

14 THE COURT: Thank you.

15 Q At the Loch Sheldrake location?

16 A No, since 1960 -- we formed Loch Sheldrake in
17 1969.

18 THE COURT: In other words, since Loch Sheldrake
19 was incorporated, it performed the service you just finished
20 describing at the location at which it still does so?

21 THE WITNESS: That's correct.

22 Q Who performs this service actually for Loch
23 Sheldrake?

24 A The service obligation or the selling obligation?

25 Q Let's take the service obligation.

2 A The service obligation is performed for us by
3 service personnel.

4 THE COURT: Employed by yourself?

5 THE WITNESS: They are not on our payroll.

6 THE COURT: Paid by you? You ultimately foot
7 the bill?

8 A Yes.

9 Q These people are not on your payroll?

10 A No.

11 Q What is the relationship, if any, between Loch
12 Sheldrake and Ramad Sales?

13 A We are a tenant-landlord relationship.

14 THE COURT: Are they the people who now own the
15 land?

16 THE WITNESS: Yes.

17 Q Does Ramad do any other work for you besides
18 serve as your landlord and allow you to put your reposse-
19 sions there?

20 MR. ROTH: I object to that. May we have that
21 question read again.

22 THE COURT: Will you read back the question,
23 please.

24 (Question read)

25 MR. ROTH: I object to that as an improper

2 characterization of the witness' testimony.

3 THE COURT: Yes, I will sustain the objection
4 to the extent that it objects to the latter part.

5 Does Ramad perform any other services for you?

6 THE WITNESS: To the best of my knowledge, it
7 doesn't.

8 Q Are you familiar with the requirements of law
9 under the vehicle and traffic laws of the State of New York
10 to operate as a dealer in the State of New York?

11 A I am somewhat familiar with it.

12 Q Can you state what those requirements were in
13 general terms for the period April '73 to the present?

14 THE COURT: If you know.

15 A Well, to the best of my knowledge, up to April
16 of '73 there was a requirement that a New York State mobile
17 home dealer had to have a dealership license issued by
18 the State of New York.

19 Q Up to what date?

20 A Sometime in April. I think it was April 10th.

21 Q 1973?

22 A Correct. The law was changed then and effective
23 April 10th, I believe, '73, they no longer required --
24 that is, a mobile home dealer, an auto dealer did but not
25 a mobile home dealer was not required to have a dealer

2 license. They could have transporter plates if they had
3 their own trucks but if they didn't have their own trucks
4 they didn't need transporter trucks either.

5 Q Could it be that the effective date of that
6 change was April of 1974?

7 A Not to my knowledge, no. But I could be wrong.

8 Q Is it a fact that --

9 MR. ROTH: Your Honor, may I voice an objec-
10 tion. The only reason I voice it, there is another witness
11 I would like to call and your Honor has mentioned he had a
12 3:30 termination and another appointment scheduled and we
13 have been late commencing with this hearing and I object
14 to that type of questioning. The law is as it is on the
15 books.

16 THE COURT: Of course, insofar as your objection
17 is based on the law is whatever it is.

18 Q Do you have any transporter trucks?

19 A When you say you, I would like to ask you who
20 you are referring to.

21 Q Whoever is the dealer there.

22 THE COURT: Loch Sheldrake, he says, is the
23 dealer.

24 A If you are referring to Loch Sheldrake as having
25 transporter plates, the answer is no. He sub-contract

2 that work out.

3 Q To whom?

4 A We sub-contract it out to Ramad and to other
5 independent truckers.

6 Q And did you do that during the period prior to
7 December of '73?

8 A We did it after we sold the land.

9 THE COURT: Which was when, again?

10 THE WITNESS: In around the early part of April
11 '73.

12 Q You continued to have your own transporter or
13 dealer plates during the balance of '73, did you not?

14 A I believe we might have. I don't know. There
15 was a transfer made sometime during that period.

16 Q You don't have any now, at any rate?

17 A No.

18 Q Do you know whether Ramad had any during 1973?

19 A I believe they did but I am not really familiar
20 with their -- whether they did or not.

21 Q In the course of your business, do you from time
22 to time repossess for your own account or for the account
23 of those you serve mobile homes?

24 MR. ROTH: Objection.

25 THE COURT: Overruled. Which means will you

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2 please answer the question.

3 A The answer to the question is yes, we do.

4 Q Customarily, what do you do with the homes that
5 you repossess in that fashion?

6 A We take them to sales locations that we own in
7 most instances. If it is economically feasible to do so.
8 That is, by that I mean if there is a mobile home that is
9 repossessed in California, it is not a market area for us,
10 we won't move the mobile home from there to New York
11 State. We would make some other arrangement for that
12 unit.

13 Q Do you store these repossession, whether they
14 are from your market area or not, under any circumstances
15 in mobile home locations or sales lots that are not owned
16 by you or that are not subsidiaries of yours?

17 A We have some --

18 THE COURT: I am not concerned with what happens
19 anywhere but at Loch Sheldrake.

20 Q Do you know whether Ramad has authority to haul
21 mobile homes other than its own?

22 MR. ROTH: Objection.

23 THE COURT: Sustained.

24 Q Did I understand that your business, that of
25 Rex-Ijoreco at the Loch Sheldrake location changed after

2 you sold the land?

3 MR. ROTH: Objection.

4 THE COURT: I will sustain the objection. It
5 seems to me that is precisely the question I must deter-
6 mine.

7 MR. ROTH: He has testified what he has done
8 before and and he testified what he does now.

9 Q Does Lech Sheldrake sell new mobile homes at any
10 location?

11 MR. ROTH: Objection, your Honor.

12 THE COURT: Sustained.

13 MR. FABRICANT: No further questions.

14 THE COURT: Mr. Roth, before you call your next
15 witness, do you want to make an offer of proof? I am
16 not sure whether it would be necessary. I would like to
17 hear what you have to say.

18 MR. ROTH: My offer of proof, your honor, is that
19 this witness, if examined in detail, would testify in con-
20 pliance with the affidavit that he gave originally in sup-
21 port of the order to show cause, and would further testify -

22 THE COURT: That he did what?

23 MR. ROTH: Would testify --

24 THE COURT: Who is it? No, I am talking about
25 the next witness. You said you had another witness.

2 MR. ROTH: I would think -- I would prefer -- I
3 expect to be only ten minutes with him. I don't think his
4 testimony --

5 THE COURT: The question in my mind is whether
6 I will need whatever it is you are going to put before me
7 to decide this.

8 MR. ROTH: I would propose to call as my next
9 witness Mr. Goodstein. I believe that Mr. Goodstein, if
10 examined, would be required to testify that beginning in
11 the summer of last year when he was in our employ, he
12 started negotiations surreptitiously with the bank for which
13 we did a variety of work, including selling repossessed
14 units. That that bank was then under contract with us.
15 That those discussions continued in August of last year --

16 THE COURT: Let me state that if I thought the
17 determination here depended on the equities of the situa-
18 tion, I would think it quite appropriate for you to ask
19 these questions. But I really don't. I think that I have
20 very much a straight contract question here and I am pre-
21 pared to rule at the present time.

22 I called this hearing not because I was defini-
23 tively of the view that I needed more evidence than was before
24 me in the affidavits but because there were differing
25 assessments as to what the facts meant and I thought that
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2 I could weigh them best by hearing a live witness and I
3 feel that's being accomplished as far as I'm concerned.

4 I believe that the operation being conducted by
5 Loch Sheldrake at the Loch Sheldrake location is at least
6 substantially similar today to what it was at the time
7 that the letter agreement of August 14, 1970 was entered
8 into. There is no doubt that Mr. Goodstein is conducting
9 an operation for the sale of mobile homes, which is for-
10 bidden by that agreement. There is no doubt that the
11 location at which he is doing so is within seven miles or
12 approximately seven miles of the location of Loch Sheldrake,
13 which, of course, is well within the 200 mile limit
14 imposed by the agreement. I need not rule as to whether
15 the 200 mile limit is itself reasonable since I find
16 that the seven mile distance in this case is -- would
17 clearly have been a reasonable scope if that had been the
18 measuring standard and I think it's perfectly appropriate
19 to measure the facts -- the proposition before me on the
20 facts as they exist rather than as they might have under
21 other circumstances.

22 I therefore find that Mr. Goodstein has violated
23 the covenant, that the covenant is reasonable within the
24 tests, particularly of New York law as I know it to be
25 in Karpinski against Ingrasci 28 New York 2d 45. Also
47 U.S. 7

2 320 New York Supp 2d. 1, 1971. I believe there may be
3 good reason to consider that New York law applies. If
4 it does not, then New Jersey law applies. I must be candid
5 though and admit that I have not yet had a chance to read
6 the controlling case referred to by plaintiff's counsel,
7 Solari Industries, Inc. against Malady, 55 New Jersey 571.
8 Also 264 Atlantic 2d. 53. 1970. But as described, the
9 holding of the case appears to be nearly identical with that
10 of New York law, if not identical. If Mr. Fabricant
11 believes that New Jersey law is different and controls,
12 and we are down to that narrow issue, and I ask you
13 whether you do, Mr. Fabricant?

14 MR. FABRICANT: I have already conceded that the
15 laws of New Jersey and New York are substantially the
16 same.

17 THE COURT: Under the circumstances it seems to
18 me that the plaintiffs have demonstrated the probability
19 of success on this motion for a preliminary injunction and
20 that they would suffer irreparable harm if Mr. Goodstein's
21 operation were launched as it is planned. I recognize,
22 however, that for him this is his sole means of liveli-
23 hood or his sole projected livelihood, whereas for the
24 defendants they are not solely dependent on this operation.
25 Under the circumstances the motion for a preliminary

2 injunction is granted. However, I will stay the entry of
3 -- rather the effective date of the injunction itself for
4 one week to permit Mr. Fabricant to apply for a further
5 stay to the Court of Appeals. I believe you can get to
6 the Court of Appeals that quickly, Mr. Fabricant, if you
7 wish. If for some reason beyond your control you are not
8 able to secure a hearing on a further stay, I will, of
9 course, extend my stay so you can.

10 Mr. Roth, I ask you to submit an order as quickly
11 as possible and to send it by the fastest means to Mr.
12 Fabricant so he can let me know over the telephone whether he
13 has any objection to the proposed order which you submit.

14 MR. FABRICANT: May I ask your Honor, being
15 unfamiliar with the calendar practice on a matter of this
16 sort in this court, in terms of this being a temporary
17 restraining order --

18 THE COURT: No.

19 MR. FABRICANT: This is the hearing on the pre-
20 liminary injunction?

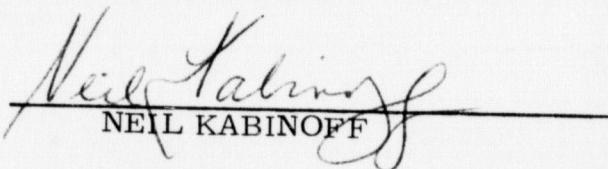
21 THE COURT: That's correct. I really think the
22 factual questions are very narrow if they exist at all but
23 I consider this to be the hearing and I know of no reason
24 why it should not be so regarded.

Re: Rex-Noreco, Inc. vs.
Goodstein & Parksville
Mobile Modular, Inc.
74-1711

STATE OF NEW YORK)
: ss.:
COUNTY OF ORANGE)

NEIL KABINOFF, being duly sworn, deposes and says: deponent
is not a party to the action, is over 18 years of age and resides at Route 17M.
Monroe, New York.

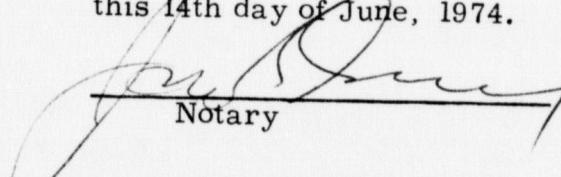
On June 14, 1974, deponent served the within Brief and Appendix
upon Finley, Kumble, Heine, Underberg & Grutman, 477 Madison Avenue,
New York, New York, the Plaintiff Appellee herein by delivering three true
copies thereof to them personally.



NEIL KABINOFF

Sworn to before me

this 14th day of June, 1974.



Notary

JAMES G. SWEENEY
Notary Public in the State of New York
Residing in Orange County
Commission Expires June 1976